

87-1484

No. _____

IN THE

Supreme Court of the United States

October Term, 1987

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, DISTRICT LODGE
751,

Petitioner,

v.

THE BOEING COMPANY and
THOMASINE NICHOLS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Joseph P. Manners
1300 Connecticut Ave. N.W.
Washington, D.C. 20036

Hugh Hafer*
Cheryl A. French
2505 Third Avenue
Suite 309
Seattle, WA 98121
(206) 728-7280

* Counsel of Record
for Petitioner

Supreme Court, U.S.
FILED

FEB 25 1988

JOSEPH F. SPANGL, JR.
CLERK

54 PM



QUESTIONS PRESENTED

1. May religious accommodations requiring more than de minimus costs be required of labor unions under the religious accommodation provision of Title VII?
2. Is it a violation of the Establishment Clause of the First Amendment for Congress to require unions, which are private parties, to alter their labor agreements and forego the collection of union dues to satisfy the "religious necessities" of employees with religious objections to supporting unions?
3. Does Section 19 of the National Labor Relations Act, which specifically addresses the balance to be drawn between union security clauses and employees' religious objections to unions, supercede the more general requirement for accommodation of religious practices found in Title VII of the Civil Rights Act?

LIST OF PARTIES*

International Association of Machinists and Aerospace Workers,
District Lodge 751, Petitioner

The Boeing Company, Respondent

Thomasine Nichols, Respondent

The United States, represented by the Department of Justice, appeared as *amicus curiae* in the Court of Appeals

* Justice Anthony M. Kennedy was a member of the panel which heard the appeal in the Ninth Circuit.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
STATEMENT OF CASE	2
REASONS FOR GRANTING THE WRIT	4
I. SUBSTANTIALLY GREATER THAN DE MINIMUS COSTS FOR RELIGIOUS ACCOMMODATION ARE REQUIRED OF UNIONS UNDER THE RULE APPLIED BY THE COURT BELOW. THIS DECISION IS IN CONFLICT WITH <i>TWA v. HARDISON</i>	4
II. THE RELIGIOUS ACCOMMODATION PROVISION OF TITLE VII OF THE CIVIL RIGHTS ACT, AS APPLIED BY THE COURT BELOW TO REQUIRE UNIONS TO FOREGO COLLECTION OF DUES FROM RELIGIOUS OBJECTORS, VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMEND- MENT, AS INTERPRETED IN <i>ESTATE OF THORNTON v. CALDOR</i>	6
III. AS AN ALTERNATIVE TO DECIDING THE CON- STITUTIONAL ISSUE, THE COURT COULD DECIDE THIS CASE BY HOLDING THAT SECTION 19 OF THE NATIONAL LABOR RELATIONS ACT SUPERSEDES THE MORE GENERAL RELIGIOUS ACCOMMODATION PROVISION OF TITLE VII.	10
CONCLUSION	11

TABLE OF AUTHORITIES

	<i>Page(s)</i>
<i>Anderson v. General Dynamics</i> , 589 F.2d 397 (9th Cir. 1978), cert. denied, 433 U.S. 908	5
<i>Ansonia Board of Education v. Philbrook</i> , ____ U.S. ____, 93 L.Ed.2d 305 (1986)	8, 9
<i>Beck v. Communications Workers of America</i> , 800 F.2d 1280 (4th Cir. 1986), cert. granted, 55 U.S.L.W. 3807 (1987)	7
<i>Burns v. Southern Pacific Transportation Co.</i> , 589 F.2d 403 (9th Cir. 1978), cert. denied, 439 U.S. 1072	5, 8
<i>Busic v. United States</i> , 446 U.S. 398 (1980)	10
<i>Colgate-Palmolive-Peet Co. v. NLRB</i> , 338 U.S. 355 (1949)	7
<i>Committee for Public Education v. Nyquist</i> , 413 U.S. 756 (1973)	4
<i>Cooper v. General Dynamics</i> , 533 F.2d 163 (1976), cert. denied, 433 U.S. 908	5, 8
<i>Corporation of Presiding Bishop v. Amos</i> , ____ U.S. ____, 97 L.Ed.2d 273 (1987)	6, 8
<i>EEOC v. Davey Tree Surgery Co.</i> , 43 (BNA) FEP 1177 (N.D. Calif. 1987)	10
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962)	8
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	6, 8
<i>Estate of Thornton v. Caldor</i> , 472 U.S. 703 (1985)	2, 8, 9, 10
<i>Gray v. Gulf, Mobile & Ohio R. R. Co.</i> , 429 F.2d 1064 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971)	8
<i>Hammond v. United Papermakers and Paperworkers Union</i> , 462 F.2d 174 (6th Cir. 1972), cert. denied, 409 U.S. 1028	8
<i>Hobbie v. Unemployment Appeals Comm'n of Florida</i> , ____ U.S. ____, 55 U.S.L.W. 4210 (1987)	6, 8

TABLE OF AUTHORITIES

(Continued)

	<i>Page(s)</i>
<i>International Brotherhood of Machinists and Aerospace Workers, Lodge 751 v. The Boeing Company, et al.</i> , 833 F.2d 165 (9th Cir. 1987)	1-5
<i>Larkin v. Grendel's Den, Inc.</i> , 459 U.S. 116 (1982)	9
<i>Linscott v. Millers Falls Co.</i> , 440 F.2d 14 (1st Cir. 1971) <i>cert. denied</i> , 404 U.S. 872	8
<i>Machinists v. Street</i> , 367 U.S. 740 (1961)	7
<i>McDaniel v. Essex International</i> , 571 F.2d 338 (1978)	5
<i>Nottleson v. Smith Steel Workers</i> , 643 F.2d 445 (1981), <i>cert. denied</i> , 454 U.S. 1046 (1981)	5, 9
<i>Otten v. Baltimore & Ohio R. Co.</i> , 205 F.2d 58 (2d Cir. 1953), <i>aff'd</i> , 229 F.2d 919	9
<i>Price v. International Union, United Automobile, Aerospace and Agricultural Implement Workers</i> , 795 F.2d 1128, 1133 (2d Cir. 1986), <i>appeal pending</i> , 56 U.S.L.W. 3026 (1987)	7
<i>Railway Employees' Dept. v. Hanson</i> , 351 U.S. 225 (1956)	7
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	8
<i>Thomas v. Review Board, Indiana Industrial Employment Security Division</i> , 450 U.S. 707 (1981)	6
<i>Tooley v. Martin-Marrietta Corp.</i> , 648 F.2d 1239 (9th Cir. 1981), <i>cert. denied</i> , 454 U.S. 1098 (1981)	5, 9
<i>TWA v. Hardison</i> , 432 U.S. 63 (1977)	3, 4, 5, 6, 9
<i>United States v. Lee</i> , 455 U.S. 252 (1982)	9
<i>Yott v. North American Rockwell Corp.</i> , 501 F.2d 398 (9th Cir. 1974)	8
 Statutes 	
29 U.S.C. § 169	2, 3, 10
42 U.S.C. § 2000e(j)	2, 3, 10

IN THE
Supreme Court of the United States

October Term, 1987

No. 87-

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, DISTRICT LODGE 751

Petitioner,

v.

THE BOEING COMPANY and
THOMASINE NICHOLS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

The International Association of Machinists and Aerospace Workers District Lodge 751 ("District Lodge 751") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *International Brotherhood of Machinists and Aerospace Workers, Lodge 751 v. The Boeing Company, et al.*, 833 F.2d 165 (9th Cir. 1987).

OPINIONS BELOW

The opinion of the district court is reported at 662 F. Supp. 1069 (W.D. Wash. 1986) and is reprinted in Appendix A. (pp. A13 through A21). The opinion of the Court of Appeals is reported at 833 F.2d 165, and is reprinted in Appendix A. (pp. A1 through A12).

JURISDICTION

The court of appeals issued its opinion and judgment on November 27, 1987. This petition was filed within 90 days of that date. The Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution

Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2(a) and (c)

42 U.S.C. § 2000e (j)

National Labor Relations Act

29 U.S.C. § 158(a)(3) and (b)(2)

29 U.S.C. § 169

These provisions are reproduced in full in Appendix B.

STATEMENT OF CASE

The Petitioner, the International Association of Machinists and Aerospace Workers, District Lodge 751 ("District Lodge 751") and the Respondent, the Boeing Company ("Boeing") are parties to a collective bargaining agreement. 833 F.2d at 167; A3. This Agreement includes a union security provision, which requires all bargaining unit members to pay union dues and fees. If a unit member fails to pay union dues and fees, Boeing is required to discharge the employees at the Union's request. 833 F.2d at 167; A3-4.

Thomasine Nichols ("Nichols") is a bargaining unit employee, subject to the terms of the Agreement. 833 F.2d at 167; A3. She is also a longtime contributor and supporter of the National Right to Work Defense Committee. Court of Appeals Record, pp. 241-43; Appendix C6-C7. She requested exemption from the union security

provision of the Agreement, based on her religious objections to unions. 833 F.2d at 167; A4. The church Nichols attends does not prohibit its members from supporting or belonging to labor unions. Her religious objections to unions are based on her personal study of the Bible. 833 F.2d at 169; A7.

District Lodge 751 denied her request for an exemption. On August 29, 1985, District Lodge 751 requested that Boeing discharge Nichols due to her failure to pay union dues and fees. Boeing refused to discharge her, and refused to arbitrate the dispute, relying on its obligation to accommodate her religious beliefs under both Title VII of the Civil Rights Act ("Title VII") and Section 19 of the National Labor Relations Act ("NLRA"). 833 F.2d 167; A4; Boeing Answer.

District Lodge 751 filed this suit on February 4, 1986. In response to motions for summary judgement by all parties, the district court ruled: 1) that Section 19 of the NLRA did not supersede the religious accommodation provision of Title VII, as applied to union security provisions, 662 F. Supp. at 1071; A16-A17; and 2) that the religious accommodation provision of Title VII did not violate the Establishment Clause. 662 F. Supp. at 1071-73; A17-A21. The district court did not rule on the constitutionality of Section 19 of the NLRA, since it found that the parties agreed this statute does not apply to Nichols.¹ 662 F. Supp. at 1071; A 16.

District Lodge 751 appealed this decision to the Ninth Circuit. The Union argued that the accommodation required of District Lodge 751 violated the Establishment Clause, as interpreted in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) and was inconsistent with the limitation that only *de minimus* costs could be required for religious accommodation, established in *TWA v. Hardison*, 432 U.S. 63 (1977). The court of appeals rejected these arguments, holding that a union must forego collection of union dues from religious objectors absent "a widespread refusal to

¹ This finding was in error. Although Nichols does not claim Section 19 applies to her, Boeing does not concede this fact.

pay union dues.” 833 F.2d at 171; A10. District Lodge 751 also argued that the more specific Section 19 of the National Labor Relations Act, 29 U.S.C. §169, under which Nichols would not qualify for an exemption, superseded the more general religious accommodation provision of Title VII, as it applied to union security provisions. This argument was rejected as well. 833 F.2d at 169-170; A6-A9. District Lodge 751 asks the Court to review this decision.

REASONS FOR GRANTING THE WRIT

I. SUBSTANTIALLY GREATER THAN DE MINIMUS COSTS FOR RELIGIOUS ACCOMMODATION ARE REQUIRED OF UNIONS UNDER THE RULE APPLIED BY THE COURT BELOW. THIS DECISION IS IN CONFLICT WITH *TWA v. HARDISON*.

In *TWA v. Hardison*, 432 U.S. 63 (1977) the Court limited the religious accommodation that would be required under Title VII.² The employee in that case was discharged because he refused to work on his Sabbath. The Court rejected several possible accommodations as unduly burdensome, including one alternative which would have cost TWA \$150.00 over three months. *Hardison*, 432 U.S. at 92 n. 6 (J. Marshall, dissenting); *Cf.*, *Committee for Public Education v. Nyquist*, 413 U.S. 756, 780-83 (1973) (Tuition grants of \$50-\$100 per child for children attending sectarian schools held to violate Establishment Clause). The Court held that an employer may not be required “to bear more than a *de minimus* cost” in order to accommodate an employee’s religious practices. *Hardison*, 432 U.S. at 84. Moreover, the Court refused to require TWA “to take steps inconsistent with the otherwise valid [collective bargaining] agreement.” *Hardison*, 432 U.S. at 79.

In contrast, the court below has required an accommodation of District Lodge 751 that will cost significantly more than the

² Since the Court found that all possible accommodations would cause undue hardship, the Court did not decide if the statute violated the Establishment Clause. *Hardison*, 432 U.S. at 70.

\$150.00 found unduly burdensome in *Hardison*. Under the court's ruling, a union must forego collection of all union dues from religious objectors, allowing these employees to make a "substituted charitable contribution." *IAM v. Boeing*, 833 F.2d at 171.³ A union can avoid this accommodation only if it can prove "that the 'substituted charity' accommodation, . . . will deprive the union of monies necessary for its maintenance or operation." *Tooley v. Martin-Marrietta, Corp.*, 648 F.2d 1239, 1244 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981). To prove such undue hardship "a union must demonstrate a widespread refusal to pay union dues." *IAM v. Boeing*, 833 F.2d at 171.

The annual loss of hundreds of dollars in dues from Nichols alone is certainly more significant to District Lodge 751, a local union in Seattle, than the one-time loss of \$150.00 rejected in *Hardison* would have been to TWA, an international corporation holding billions of dollars in assets. Moreover, as in *Hardison*, the court below has failed to take into account the likelihood that District Lodge 751 may represent many employees with similar religious objections to unions. *Compare, Hardison*, 432 U.S. at 84 n. 15. The record shows that the National Right to Work Defense Foundation encourages the utilization of the Title VII exemption by providing prepared materials on request, including biblical references, legal citations and form letters, to employees seeking to avoid union security provisions. (Record, Court of Appeals, pp. 164-66; Appendix C1-C5). These activities by a national Right to Work organization indicate the problem of accommodating individuals who claim religious exemptions from union security provisions is a problem of national proportions.

³ The same result has been reached in *Nottleson v. Smith Steel Workers*, 643 F.2d 445, 451-52 (1981), *cert. denied*, 454 U.S. 1046 (1981); *Tooley*, 648 F.2d at 1242-43; *Anderson v. General Dynamics*, 589 F.2d 397, 401-402 (9th Cir. 1978), *cert. denied*, 433 U.S. 908; and *Burns v. So. Pacific Transport*, 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1978). Union dues cases which have been remanded for a determination of undue hardship are *Cooper v. General Dynamics*, 533 F.2d at 163, 165, 170 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 and *McDaniel v. Essex Int'l*, 571 F.2d 338, 344 (6th Cir. 1978).

By requiring a union to show that the loss of dues from a particular individual would deprive the union of "monies necessary for its maintenance or operation," the court below has reversed the criteria of *de minimus* costs applied in *Hardison*. By requiring a union and an employer to disregard an agreed upon union security provision, the court below has forced them "to take steps inconsistent with the otherwise valid agreement", contrary to *Hardison*. 432 U.S. at 79. This decision turns *Hardison* on its head and should be reviewed.

II. THE RELIGIOUS ACCOMMODATION PROVISION OF TITLE VII OF THE CIVIL RIGHTS ACT, AS APPLIED BY THE COURT BELOW TO REQUIRE UNIONS TO FOREGO COLLECTION OF DUES FROM RELIGIOUS OBJECTORS, VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT, AS INTERPRETED IN *ESTATE OF THORNTON v. CALDOR*.

The First Amendment while prohibiting "an establishment of religion" simultaneously guarantees the "free exercise" of religion. Together, these two clauses "mandate government neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968). However, in situations involving both free exercise and establishment considerations, the determination of the neutral course is not simple. An unconstitutional "burden on religion" may be created by a facially neutral rule which denies an individual "a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Hobbie v. Unemployment Appeals Comm'n of Florida*, ____ U.S. ____, 55 U.S.L.W. 4208, 4209 (1987), quoting *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 717-18 (1981). In such cases government may "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions" without violating the Establishment Clause. *Corporation of Presiding Bishop v. Amos*, ____ U.S. ____, 107 S. Ct. 2862, 2868 (1987). (emphasis added).

These complexities are not involved in determining the constitutionality of the regulation of union security provisions under the religious accommodation provision of Title VII. The Free Exercise Clause regulates the conduct of government. Union security provisions are the "product of private negotiations" between employers and unions and are "not attributable to the government." *Price v. International Union, United Automobile, Aerospace and Agricultural Implement Workers*, 795 F.2d 1128, 1133 (2d Cir. 1986), *appeal pending*, 56 U.S.L.W. 3026 (1987).⁴ Although the NLRA does not prohibit the inclusion of union security provisions in collective bargaining agreements, it "allows private parties to do nothing more than what they could have agreed to do without the NLRA." *Price*, 795 F.2d at 1132. As the Court recognized in *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 n. 13 (1949), the origins of union shop agreements can be traced "to the English Guild system", antedating the NLRA by centuries. Furthermore, even assuming government action, the enforcement of union security provisions has consistently been held not to infringe

⁴ See also, *Beck v. Communications Workers of America*, 800 F.2d 1280, 1282 (4th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3807 (1987). (In an en banc decision, the court of appeals affirmed a panel decision finding jurisdiction to review operation of union security provision, but 5 of 10 judges found no state action in enforcement of union security provision, with 3 judges taking the position that issue need not be decided.) This argument assumes the Court will not alter the existing state of the law in its decision in *Beck*.

The Court has found government action in evaluating the union security provisions under the Railway Labor Act. *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 232 (1955); and *Machinists v. Street*, 367 U.S. 740 (1961). This holding must be viewed in its context, however. Under the Railway Labor Act, unions and employers are allowed to agree to union security provisions, regardless of state laws prohibiting such agreements. *Hanson*, 351 U.S. at 228-29. Thus, in the right-to-work states where it was challenged, the Railway Labor Act is viewed as the "source of the power and authority by which any private rights are lost or sacrificed." *Hanson*, 351 U.S. at 232. In contrast, under the NLRA, states are permitted to prohibit union security clauses. The NLRA merely permits private parties to make such agreements.

on the Free Exercise rights of affected employees.⁵ The reliance of the court of appeals on cases involving Free Exercise considerations, such as *Hobbie*, *Sherbert* and *Amos* (833 F.2d at 168 n. 3, 169 n.4 and 171; A6, A10) is erroneous.⁶ These cases are not relevant here. The sole question to be asked in evaluating the Title VII requirement that union security clauses give way to the interest of religious objectors is whether the governmental imposition of this accommodation on private parties is a violation of the Establishment Clause.

The Establishment Clause is violated "when the power, prestige and financial support of government is placed behind a particular religious belief." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Government may not "aid, foster, or promote one religion or religious theory against another or even against the militant opposite." *Epperson*, 393 U.S. at 103-104. A prime example of this principle is the Court's recent decision in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985). In *Thornton*, the Court held that a Connecticut statute which prohibited an employer from discharging an employee for refusing to work on the Sabbath violated the Establishment Clause. The legislature singled out a particular religious practice; refraining from work on the Sabbath. It then placed the power of government behind that practice by imposing on employers and other employees "an absolute duty to conform their business practices to the particular religious practices of the employee." *Thornton*, 472 U.S. at 709. This had "a primary effect

⁵ *Burns v. So. Pacific Transport Co.*, 589 F.2d 403, 407-8 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1978); *Cooper v. Gen'l Dynamics, Convair-Aerospace Div.*, 533 F.2d 163, 166 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 403-404 (9th Cir. 1974); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 17-18 (1st Cir. 1971), *cert. denied*, 404 U.S. 872; *Gray v. Gulf, Mobile & Ohio R. R. Co.*, 429 F.2d 1064, 1068-1072 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); *Hammond v. United Papermakers and Paperworkers Union*, 462 F.2d 174, 175 (6th Cir. 1972), *cert. denied*, 409 U.S. 1028.

⁶ The reliance by the court of appeals on *Ansonia Board of Education v. Philbrook*, ____ U.S. ____, 107 S. Ct. 367 (1986) is also misplaced. The Court was not asked to decide the constitutional issue in that case.

that impermissibility advances a particular religious practice," thus violating the Establishment Clause.⁷

The same result occurs when the religious accommodation provision of Title VII is applied to require unions to forego collection of union dues from religious objectors. Title VII, as interpreted by the courts, singles out a particular religious practice, the refusal to support unions. The power of government has then been placed behind that practice, making it unlawful for a union to collect union dues, under an otherwise valid and enforceable union security clause, from religious objectors. The decision of the court below, and of the other courts which have reached this issue,⁸ which require unions to accommodate employees' "religious necessities" by foregoing the collection of dues, violates the Establishment Clause. *Thornton*, 472 U.S. at 710, quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953), *aff'd*, 229 F.2d 919.⁹

Justice O'Connor's suggestion in her concurring opinion that *Thornton* did not apply to Title VII's requirement that employers accommodate religious views is certainly correct in the sense that compromise between employer and workers is possible; however, the allowable area of mandated compromise is narrow indeed. *Hardison*, 432 U.S. at 84; See also, *Ansonia Board of Education*,

⁷ See also, *United States v. Lee*, 455 U.S. 252, 261 (1982) (Accommodation not allowed where "granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on employees"); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Statute which gives churches power to veto liquor license applications of neighboring businesses violates Establishment Clause.)

⁸ *Nottleson v. Smith Steel Workers*, 643 F.2d 445, 451-52 (1981), *cert. denied*, 454 U.S. 1046 (1981); *Tooley v. Martin-Marrietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

⁹ The Court's quotation of *Otten* is of particular note here because in that case the Second Circuit upheld a union security clause challenged on the basis of the Free Expression Clause. Judge Hand reasoned that First Amendment protections are limited to protection "against action by the government" and choices between one's religious beliefs and economic losses due to the actions of private parties are "the compromises necessary in communal life." *Otten*, 205 F.2d at 61.

93 L.Ed.2d at 314-15 (Employer not required to allow employee choice among alternate reasonable accommodations). In any case, that view cannot be applied here — the duty imposed by the Court below is total. The Union must forego all dues from religious objectors. It is this absolute preference for the religious objectors which brings this case four square within the rule of *Thornton*. Since the decision below conflicts with the teaching of *Thornton*, review should be granted.

III. AS AN ALTERNATIVE TO DECIDING THE CONSTITUTIONAL ISSUE, THE COURT COULD DECIDE THIS CASE BY HOLDING THAT SECTION 19 OF THE NATIONAL LABOR RELATIONS ACT SUPERSEDES THE MORE GENERAL RELIGIOUS ACCOMMODATION PROVISION OF TITLE VII.

A general principle of statutory construction is that when more than one statute relates to the same subject, the "more specific statute will be given precedence over a more general one." *Busic v. United States*, 446 U.S. 398, 406 (1980). The religious accommodation provision of Title VII, which was enacted in 1972, established a general duty of employers (applied to unions by the courts) to "reasonably accommodate" the religious practices of employees. 42 U.S.C. § 2000e(j). In contrast, Section 19 of the NLRA, enacted in 1980, specifically established the circumstances under which a lawful union security provision would give way to an employee's religious objections to supporting a union. 29 U.S.C. § 169. Nichols is not a member of "a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations." 29 U.S.C. § 169.

District Lodge 751 argued before the trial court and the court of appeals that Section 19 superseded the more general religious accommodation provision of Title VII. Both courts rejected this argument. This is not an issue which has been addressed by the other courts of appeal.¹⁰ District Lodge 751 does not present this issue as

¹⁰ The only other decision reaching this issue is a district court decision. *EEOC v. Davey Tree Surgery Co.*, 43 (BNA) FEP 1177 (N.D. Calif. 1987).

an independent ground for granting the petition for certiorari. However, if the Court accepts review of the constitutional issue presented above, it may wish to resolve the case on this alternative statutory basis. This issue is included in the petition for that reason.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED this 25th day of February, 1988.

Respectfully submitted,

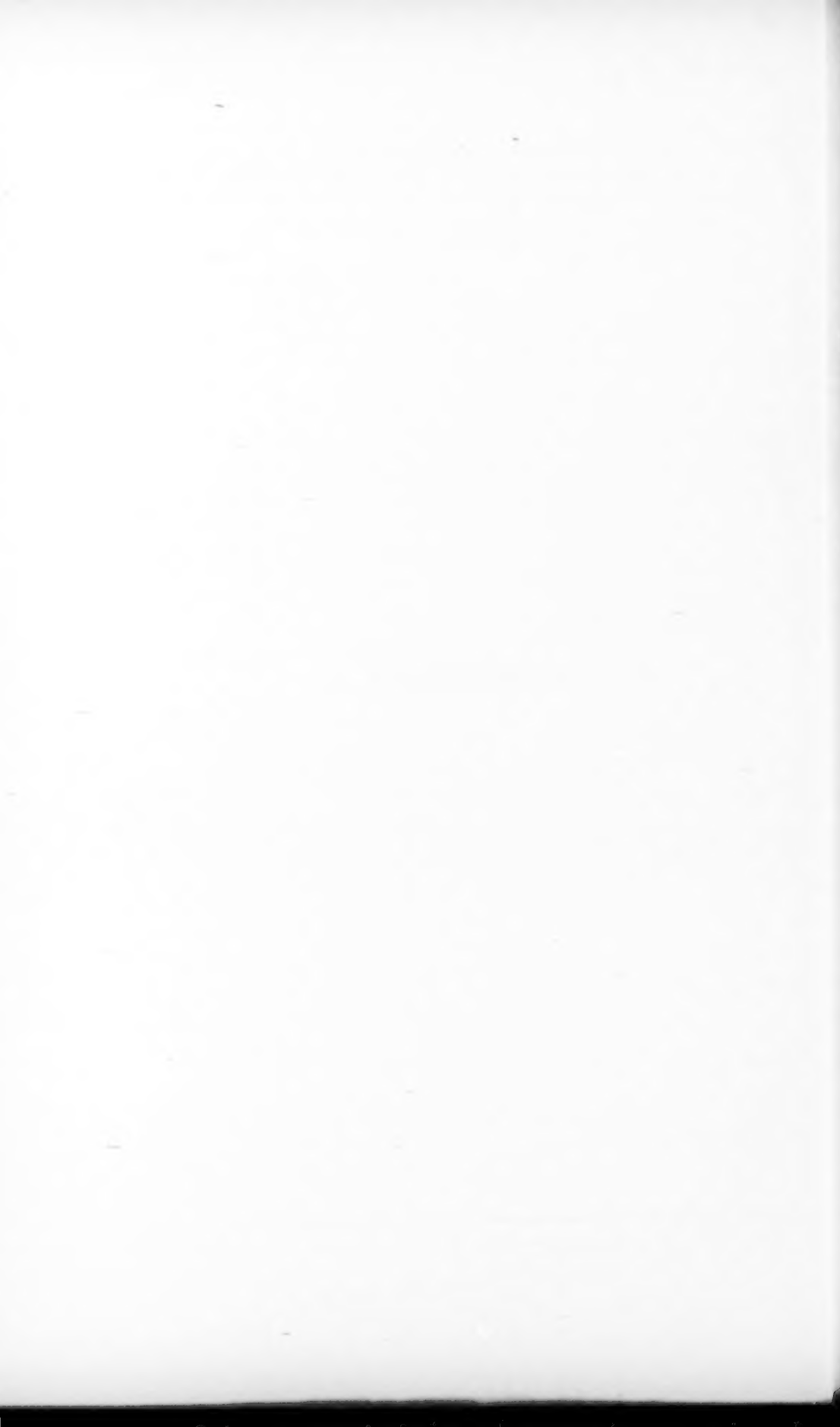
Joseph P. Manners
Washington, D.C.

Hugh Hafer*
Cheryl A. French
Seattle, Washington

Counsel for Petitioners

* Counsel of Record

APPENDIX A



FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE
WORKERS, LODGE 751,

*Plaintiff-Appellant/
Cross Appellee,*

v.

THE BOEING COMPANY,

Defendant-Appellee,

and

THOMASINE NICHOLS,

*Defendant-Appellee/
Cross Appellant.*

Nos. 86-4345, -

86-4373

D.C. No.

CV86-0139

OPINION

On Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted
September 8, 1987 — Seattle, Washington

Filed November 27, 1987

Before: Anthony M. Kennedy and Robert R. Beezer, Circuit
Judges, and Leland C. Nielsen,* District Judge.

Opinion by Judge Beezer

* Honorable Leland C. Nielsen, United States District Judge, Southern District of California, sitting by designation.

SUMMARY

Constitutional Law/Labor

Appeal from judgment. Affirmed.

Appellant Machinists and appellee Boeing entered into a collective bargaining agreement that includes a union security provision requiring bargaining unit employees to pay union initiation fees and dues to the Machinists. Appellee Nichols, a bargaining unit employee, believes that union membership and support of labor organizations are contrary to her religious convictions. She requested exemption and proposed contributing a sum equal to her union dues to a charity. The Machinists rejected Nichols' proposal and requested that Boeing discharge Nichols. Boeing asserted that discharging Nichols would violate Title VII, which requires that employers take reasonable steps to accommodate the religious beliefs of their employees.

[1] The Civil Rights Act requires employers to take reasonable steps to accommodate their employees' religious beliefs. [2] The loss of one employee's dues does not inflict undue hardship on a union. [3] The Machinists contend that section 19 of the NLRA supersedes section 701(j) of Title VII. Under section 19 only employees who are members of "bona fide" religions which have "historically held conscientious objections" to joining unions may contribute to charities in lieu of paying their dues to the union. [4] In support of their claim the Machinists invoke a maxim of statutory construction that only applies when there is an irreconcilable conflict between the statutes. [5] No irreconcilable conflict exists between section 701(j) of Title VII and section 19 of the NLRA. [6] Section 701(j) does not give an unqualified right to employees to have their religious beliefs accommodated. By its terms section 701(j) is flexible, requiring only those accommodations which are reasonable and which may be accomplished without undue hardship. [7] The substituted charitable contribution is a reasonable accommodation under 701(j), and section 701(j) does not violate the Establishment Clause. [8] Nichols asserts she is entitled to fees because the Machinists' claim is barred by res judicata and collateral estoppel. [9] Res judicata is inapplicable here. [10] as is collateral estoppel.

COUNSEL

Edward M. Gaffney, Jr., Los Angeles, California, and Steven T. McFarland, Ellis & Li, Seattle, Washington, for the defendant-appellee/cross appellant Thomasine Nichols.

Evan Jay Cutting, Office of General Counsel, The Boeing Company, Seattle, Washington, for the defendant-appellee The Boeing Company.

Hugh Hafer and Cheryl A. French, Hafer, Price, Rinehart & Schwerin, Seattle, Washington, for the plaintiff-appellant-cross appellee Int'l Assoc. of Machinists and Aerospace Workers.

OPINION

BEEZER, Circuit Judge:

Based on her religious convictions, Nichols, an employee of the Boeing Company (Boeing), refused to become a member of or pay dues to the International Association of Machinists & Aerospace Workers, Lodge 751 (the Machinists). Nichols proposed to make a charitable contribution in lieu of paying dues. The union sued to compel Boeing to arbitrate the question of whether to discharge Nichols. The district court granted summary judgment in favor of Boeing and Nichols. We take jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

A. Facts and Issues

The Machinists and Boeing entered into a collective bargaining agreement that includes a union security provision. That provision requires bargaining unit employees to pay union initiation fees and dues to the Machinists. Nichols, a bargaining unit employee, believes that union membership and support of labor organizations

are contrary to her religious convictions. She requested exemption from the union security provision on the basis of her religious objections. Nichols proposed contributing a sum equal to her union dues to a charity. The Machinists rejected Nichols' proposal and requested that Boeing discharge Nichols. Boeing asserted that discharging Nichols would violate Title VII, which requires that employers take reasonable steps to accommodate the religious beliefs of their employees.

The union claims that section 19 of the NLRA, 29 U.S.C. § 169, supersedes Title VII's religious accommodation provision and does not protect the employee. Alternatively, the union contends that *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), compels us to hold that Title VII's religious accommodation provision violates the Establishment Clause of the First Amendment. These are issues of law, reviewable de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984).

B. Ninth Circuit Precedent

[1] In 1972 Congress amended Title VII of the Civil Rights Act. The 1972 amendment requires employers to take reasonable steps to accommodate their employees' religious beliefs. The reasonable accommodation duty was incorporated in Title VII's definition of religion:

The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 701(j) of Title VII, 42 U.S.C. § 2000e(j).¹

¹On its face section 701(j) applies to employers only. This court has held, however, that the duty to accommodate an employee's religious beliefs extends to unions as well as employers. *Tooley*, 648 F.2d at 1241; *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

[2] In 1981 we held that a substitute charitable contribution, proposed by Seventh Day Adventists who opposed joining or supporting a labor union, was a reasonable accommodation under section 701(j). *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981). As we said then:

The substituted charity accommodation is consistent with the balancing of interests promoted by section 701(j). Under this accommodation, the union is entitled to enjoy the benefits of the union shop agreement while the plaintiffs are entitled to practice in accordance with their religious convictions.

Tooley, 648 F.2d at 1242. We also concluded that exempting the Seventh Day Adventists from the union security clause would not "result in an 'undue hardship'" on the union:

A 'widespread refusal to pay union dues' is sufficient to establish undue hardship, but that is not the contention here. The Steelworkers have not established that the 'substituted charity' accommodation, as applied here, will deprive the union of monies necessary for its maintenance or operation.

Id. at 1243-44. The loss of one employee's dues thus does not inflict undue hardship on a union. To prove undue hardship a union must demonstrate a widespread refusal to pay union dues.

In *Tooley* we also rejected the Steelworkers' Establishment Clause² challenge to section 701(j). Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a statute survives scrutiny under the Establishment Clause if: 1) the statute reflects a clearly secular purpose; 2) the statute has a primary effect that neither inhibits nor advances religion; and 3) application of the statute will not result in excessive government entanglement with religion.

² The Establishment Clause states that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. 1.

Applying the *Lemon* test in *Tooley*, we held that section 701(j) was constitutional. First, section 701(j) was enacted to promote Title VII's policy of prohibiting discrimination in the workplace. Prohibiting discrimination is a legitimate secular purpose.³ 648 F.2d at 1245. Second, the primary effect of the statute was neutral:

The substituted charity accommodation allows the plaintiffs to work without violating their religious beliefs, at a cost equivalent to that paid by their co-workers without similar beliefs. It neither increases nor decreases the advantages of membership in the Seventh-Day Adventist faith....

Id. at 1246. Finally, the accommodation would not result in excessive government entanglement with religion. A court's only task is to determine whether the employee's beliefs are sincere. Once a court has made this determination, it is for the employee and the union to agree on a mutually acceptable charity. As a result, "the substituted charity accommodation requires a minimal amount of supervision and administrative cost." *Id.*⁴

II

[3] The Machinists contend that section 19 of the NLRA, 29 U.S.C. § 169, enacted by Congress in 1980, supersedes section 701(j)

³ A statute can have a legitimate secular purpose even if it is "related" to religion. The secular purpose requirement "does not mean that the law's purpose must be unrelated to religion. . . . Rather, *Lemon's* 'purpose' requirement aims at preventing [Congress] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S.Ct. 2862, 2868 (1987).

⁴ The Supreme Court articulated a slightly different test for analyzing Establishment Clause challenges in *Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). Under this test a statute accommodating religious beliefs survives constitutional scrutiny if: 1) the accommodation reflects government neutrality in the face of religious differences, and 2) the accommodation does not result in government sponsorship or financial support for a particular religious group. Applying this test, the *Tooley* panel once again concluded that section 701(j) was constitutional. *Tooley*, 648 F.2d at 1244-45.

of Title VII. The protections afforded employees' religious beliefs are not as broad under section 19 as they are under section 701(j). Section 19 provides in pertinent part:

Any employee who is a member of or adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required. . . to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund. . . .

29 U.S.C. § 169. Hence under section 19 only employees who are members of "bona fide" religions which have "historically held conscientious objections" to joining unions may contribute to charities in lieu of paying their dues to the union. In contrast, Title VII defines religion as "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). An employee who sincerely held religious beliefs opposing unions could be relieved from paying dues under Title VII, even if he or she was not a member of an organized religious group that opposes unions. *See* 29 C.F.R. § 1605.1).

Nichols attends the Bethel Temple. This church permits members to join or support labor unions. Nichols claims, however, that her personal study of the bible has led her to oppose unions on religious grounds. It is uncontested that Nichols sincerely holds these beliefs. Nevertheless, the Machinists assert that Nichols is not exempt from the union security clause under section 19 because she is not a member of a religious organization which has historically objected to union membership. The Machinists concede that section 701(j) would exempt Nichols from the union security clause. They assert, however, that section 19 of the NLRA supersedes section 701(j) of Title VII.

[4] In support of their claim that section 19 supersedes section 701(j), the Machinists invoke the maxim of statutory construc-

tion that a more recent specific statute prevails over an earlier and more general statute. This maxim only applies when there is an irreconcilable conflict between the statutes. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 490 n.8 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985). No conflict exists if the two statutes serve independent and separate purposes. See *Kidd v. United States Department of Interior, Bureau of Land Management*, 756 F.2d 1410, 1411 (9th Cir. 1985).

It is well-settled that the rights created by Title VII are independent and separate from the rights created by the NLRA. According to the Supreme Court, "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974).

[5] No irreconcilable conflict exists between section 701(j) of Title VII and section 19 of the NLRA. Congress has created a right to be free from religious discrimination in both statutes. The rights Nichols possesses under both statutes "have legally independent origins and are equally available to the aggrieved employee." *Id.* at 50. Nichols is free to pursue her remedies under Title VII; that her remedies may be broader under Title VII than under the NLRA merely reflects that Congress devised schemes with differing coverage and enforcement provisions, the more thoroughly to eradicate discrimination in the workplace.

The legislative history of section 19 furnishes additional support for Boeing's and Nichols' position. This legislative history indicates that Congress did not intend section 19 of the NLRA to supersede section 701(j) of Title VII. The House Report accompanying H.R. 4774 expressly stated that "[t]he bill would accommodate the religious beliefs of these persons and *thereby reconcile the National Labor Relations Act with Section 701(j) of the Equal Employment Opportunity Act.*" H.R. Rep. No. 496, 96th Cong. 1st Sess., 2 (1980) (emphasis added). As recently observed, "It is inconceivable

that Congress would, in an amendment intended to increase religious freedom, act to foreclose individuals from protecting that freedom under Title VII. The only conclusion to be drawn from the legislative history is that Congress was, as it stated, attempting to reconcile the NLRA with Title VII. . . ." *EEOC v. Davey Tree Surgery Co.*, 43 Fair Empl. Prac. Cas. (BNA) 1177, 1180 (N.D. Cal. 1987).⁸

The Machinists rely on isolated statements made by Representative Eckhardt, who recognized that Title VII provided wider scope for religious accommodation than did the NLRA. Eckhardt opposed the section 19 amendment⁹ because he feared it would restrict the broad, nontraditional definition of religion in section 701(j). 126 Cong. Rec. 2585 (1980). The Machinists contend that Eckhardt's concern shows Congress knew of the difference between section 19 and section 701(j) and therefore intended to limit the exemption to those individuals covered by section 19. This argument is unpersuasive. "In the legislative history of every statute, one may find critics of the bill who predict dire consequences in the event of its enactment. A court need not infer from such statements by opponents that Congress *intended* those consequences to occur, particularly where, as here, there is compelling evidence to the contrary." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 525 (1985) (Powell, J., dissenting).

III

In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Supreme Court held that a Connecticut statute that provided employees with an absolute right not to work on their Sabbath violated the Establishment Clause. The Court concluded that the Connecticut statute's "unyielding weighting in favor of Sabbath

⁸ The *Tooley* panel was not presented with the claim that section 19 superseded section 701(j). In dicta, however, the panel noted that "the substituted charity accommodation effects a reasonable reconciliation between the NLRA and Title VII, and otherwise constitutes a reasonable accommodation under section 701(j)." *Tooley*, 648 F.2d at 1242. Thus the *Tooley* panel implicitly concluded that section 19 had not superseded section 701(j) of Title VII.

⁹ Before the 1980 amendment, section 19 applied only to health-care employees.

observers over all other interests contravenes a fundamental principle of the Religion Clauses." *Id.* at 710. Specifically, the Court condemned the statute's command that "religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709.

The Machinists contend that *Thornton* dramatically alters the law governing Establishment Clause challenges to religious accommodation statutes. In light of *Thornton*, the Machinists assert, this court must reevaluate the holdings we made in *Tooley*.

[6] *Thornton* does not undermine *Tooley*. The Connecticut statute invalidated by the Supreme Court in *Thornton* contravened the Establishment Clause because of a complete failure to take into account the interests of the employer and other employees who did not observe a Sabbath. Unlike the statute in *Thornton*, section 701(j) does not give an unqualified right to employees to have their religious beliefs accommodated. By its terms section 701(j) is flexible, requiring only those accommodations which are reasonable and which may be accomplished without undue hardship. In this case, if there was a widespread refusal to pay union dues, Nichols' charitable contribution would be disallowed. She would be required to pay the union. *Tooley*, 648 F.2d at 1243-44. Thus 701(j) does not exhibit the defect of the Connecticut statute; here the substituted charitable contribution acknowledges legitimate interests of the Machinists and Boeing.

Justice O'Connor, concurring in the Court's judgment in *Thornton*, expressly states that she did "not read the Court's opinion as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act of 1964 are. . . invalid." 472 U.S. at 711. In addition, Supreme Court cases after *Thornton* indicate that section 701(j) is alive and well. See *Hobbie v. Unemployment Appeals Commission*, 107 S. Ct. 1046, 1047 n.1 (1987); *Ansonia Board of Education v. Philbrook*, 107 S. Ct. 367 (1986). In *Ansonia* the Court discussed the scope of an employer's obligations under section 701(j). If the court implicitly had struck down section 701(j) in

Thornton, the discussion of section 701(j) in *Ansonia* would have been academic.

[7] *Thornton* does not represent a radical departure from previous Establishment Clause jurisprudence, and *Thornton* did not implicitly strike down section 701(j). Accordingly, we need not reconsider the holdings we made in *Tooley*: the substituted charitable contribution is a reasonable accommodation under section 701(j), and section 701(j) does not violate the Establishment Clause.⁷

IV

[8] Nichols asserts she is entitled to fees under Fed. R. Civ. P. 11 and Fed. R. App. P. 38 because the Machinists' claim is barred by res judicata and collateral estoppel. The Machinists concede that they previously litigated the constitutionality of the religious accommodation provision of Title VII with Boeing in an earlier lawsuit involving a different employee. This lawsuit preceded the Supreme Court's decision in *Thornton*.

[9] Res judicata is inapplicable here. Under res judicata a judgment on the merits in a prior suit bars a second suit, involving the same parties or their privies, based on the same cause of action. See *Nevada v. United States*, 463 U.S. 110, 129-30 (1983); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). The Machinists' suit against Nichols does not involve the same parties or the same cause of action as the previous lawsuit.

[10] Collateral estoppel may bar a plaintiff from asserting a claim that the plaintiff previously litigated and lost against a different

⁷ The Third Circuit recently considered and rejected a claim virtually identical to the Machinists' claim in *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129 (3d Cir. 1986), cert. denied, 107 S.Ct. 474 (1986). In *Protos* an assembly line worker who was a member of the Worldwide Church of God requested to be excused from overtime work on Saturdays, her Sabbath. The Third Circuit concluded that Volkswagen could have reasonably accommodated the employee's religious beliefs, without incurring undue hardship, by granting her request. The Third Circuit also rejected Volkswagen's claim that *Thornton* implicitly struck down section 701(j).

defendant. *Parklane Hosiery*, 439 U.S. at 329. Nevertheless "[i]t has long been the rule in this circuit that an intervening Supreme Court decision clarifying an issue that has been uncertain in the lower courts defeats collateral estoppel." *Minnis v. United States Department of Agriculture*, 737 F.2d 784, 786 n.1 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985). *Thornton* clarified the constitutional law governing religious accommodation statutes; hence collateral estoppel is inapplicable and does not provide a basis for the award of fees.

In short, the Machinists' arguments were not frivolous under Fed. R. App. P. 38, and the Machinists' counsel satisfied the Rule 11 requirement of "a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11.

V

In *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981), we held that charitable contributions in lieu of union dues were a reasonable accommodation under Title VII. We also held that Title VII's religious accommodation provision did not contravene the Establishment Clause. Section 19 of the NLRA does not supersede Title VII's religious accommodation provision. Congress, in enacting section 19, intended the NLRA to parallel Title VII, not to supersede Title VII. The Supreme Court's holding in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), clarifies the law but does not undermine *Tooley*. Accordingly, we affirm the judgment of the district court and deny Nichols' fee request.

AFFIRMED.

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

Western District of Washington

International Association of Machinists
and Aerospace Workers, District
Lodge 751

v.

The Boeing Company and
Thomasine Nichols

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C86-139R

- ☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendants' motions for summary judgment are granted.

Date November 3, 1986

Clerk BRUCE RIFKIN

/s/ Sheila Torpey Boyer
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE
WORKERS, LODGE 751,

*Plaintiff-Appellant/
Cross Appellee,*

v.

THE BOEING COMPANY,

Defendant-Appellee,

and

THOMASINE NICHOLS,

*Defendant-Appellee/
Cross Appellant.*

NO. C86-139R

ORDER GRANTING
DEFENDANTS'
MOTION FOR
SUMMARY
JUDGMENT

THIS MATTER comes before the court on opposing motions for summary judgment brought by plaintiff International Association of Machinists and Aerospace Workers, District Lodge 751 ("the union"), defendant Boeing Company ("Boeing"), and defendant Thomasine Nichols ("Nichols"). The parties agree that there are no material facts in dispute. Having reviewed the memoranda and affidavits submitted, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Defendant Nichols refused on purportedly religious grounds to join or financially support the union.¹ The union brought this suit to compel Boeing to fire Nichols and thereby enforce the union security clause of the collective bargaining agreement.

¹ A union security clause does not infringe upon the free exercise of religion. *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 403-404 (9th Cir. 1974). Consequently, any claim of exemption from the dictates of a union security clause based upon religious beliefs must have a statutory basis.

Boeing refused to fire Nichols, asserting that Nichols is exempt from the union security clause under the religious accommodation provision of Title VII of the Civil Rights Act of 1964 ("Title VII").² This provision has the usual effect of exempting people with religious objections from having to join a union or pay union dues. *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242-44 (9th Cir. 1981).

The union moves for summary judgment on the grounds (1) that the religious accommodation provision of Title VII is superceded by the similar exemption provided in Section 19 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 169; and (2) that the religious accommodation provision of Title VII, as applied to union security clauses, violates the Establishment Clause of the First Amendment to the United States Constitution.³

II. DOES SECTION 19 OF THE NLRA LIMIT THE SCOPE OF THE RELIGIOUS ACCOMMODATION PROVISION OF TITLE VII?

Section 19 of the NLRA provides that members of a bona fide religion, body or sect which has historically held conscientious objections to joining labor unions are not required to join or financially support a union. 29 U.S.C. § 169. Nichols does not argue that she belongs to such a sect, and bases her claim entirely on Title VII, which does not make membership in a religious organization a prerequisite for exemption.

² Section 703(a)(1) of Title VII makes it an unlawful employment practice to discriminate against any individual because of such person's religion. 42 U.S.C. § 2000e-2(a)(1). Section 701(j) of the Act, added by Congress in a 1972 amendment, defined religion as including all aspects of religious observance and practice, *unless* an employer demonstrates that he is unable to reasonably accommodate an employee's religious beliefs without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000(e)(j).

³ Boeing also initially asserted that Nichols was exempt from joining or supporting the union pursuant to Section 19 of the NLRA. In response, the union contends that Section 19 is unconstitutional. Boeing and Nichols now concede, however, that Section 19 does not cover Nichols' particular situation. Therefore, this court does not need to reach the merits of the union's constitutional attack on Section 19.

The union contends, however, that the membership requirement of Section 19 is included by implication in Title VII. The question before this court is whether passage of the more restrictive NLRA provision is evidence of Congress' intent to similarly restrict the meaning of Title VII.

The legislative history of Section 19 establishes that Congress intended that section to "reconcile" the NLRA with the reasonable accommodation provision of Title VII. *United States Code Congressional and Administrative News*, 96th Congress, Second Session, 1980, p. 7159. Congress, in passing Section 19, did no more than place its stamp of approval upon a substituted charitable payment as a reasonable accommodation to an employee's religious beliefs. See *Tooley*, 648 F.2d at 1242. There is no evidence that Congress was aware of the difference in coverage between the two "virtually identical" provisions, *id.*, nor that the difference was intended to limit the plain meaning of the Title VII provision.

Title VII and the NLRA create independent and separately enforceable rights for employees. *Alexander v. Gardner-Denver*, 415 U.S. 36, 47-48 (1974). It is Congress' prerogative to establish in the NLRA context a remedy more limited, and perhaps more easily administered, than that provided by the federal courts. In the absence of evidence to the contrary, this court must conclude that Congress in adopting Section 19 of the NLRA did not *sub silencio* limit the scope of the reasonable accommodations provision of Title VII.

III. IS THE RELIGIOUS ACCOMMODATION PROVISION OF TITLE VII CONSTITUTIONAL?

The Supreme Court applies a three-part test to determine whether a statute is consistent with the strictures of the Establishment Clause. To pass constitutional muster a statute (1) must have a secular legislative purpose; (2) must not, as its principal or primary effect, advance or inhibit religion; and (3) must not foster an excessive government entanglement with religion. *Wallace v. Jaffree*, 105 S.Ct. 2479, 2489-90 (1985) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971)).

Tooley v. Martin-Marietta, 648 F.2d 1239, 1242 (9th Cir. 1981), upheld the constitutionality of the religious accommodation provision of Title VII as applied in exempting Seventh-Day Adventists from union obligations. The union contends, however, that *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985), undermines the precedential value of *Tooley*. This court must therefore determine the constitutionality of the religious accommodation provision in light of *Thornton*, and in light of claimed differences between *Tooley* and the present situation.

A. Secular Purpose

In *Tooley*, the Ninth Circuit concluded that the religious accommodation provision aided the clearly secular purpose of securing equal economic opportunity to members of minority religions. 648 F.2d at 1245. The union does not claim that this conclusion was in any way undermined by *Thornton*. The law is clear, therefore, that the religious accommodation provision meets the constitutional requirement of having a legitimate secular purpose.

B. Primary Effect

Tooley held that the religious accommodation provision did not have the primary effect of advancing plaintiffs' religion. The court stated:

The substituted charity accommodation allows the plaintiffs to work without violating their religious beliefs, at a cost equivalent to that paid by their co-workers without similar beliefs. It neither increases nor decreases the advantages of membership in the Seventh-Day Adventist faith in a manner so substantial and direct that it "advances" or "inhibits" the plaintiffs' religion.

648 F.2d at 1246.

Thornton struck down a Connecticut statute which prohibited an employer from discharging an employee for refusing to work on the

employee's Sabbath. The statute provided Sabbath observers "an absolute and unqualified right not to work on whatever day they designate as their Sabbath." 105 S.Ct. at 2917. The law contained no exceptions for situations where it would cause an employer substantial economic burdens or impose significant burdens on other employees. This "unyielding weighting in favor of Sabbath observers" went beyond having an incidental or remote effect on advancing religion, and instead had a primary effect that impermissibly advanced a particular religious practice. *Id.* at 2918.

Thornton dealt with a statute which might have imposed significant burdens upon the employer and fellow employees of a religious employee. The court gave as examples of situations in which significant burdens would be imposed (1) a Friday Sabbath observer employed in an occupation with a Monday through Friday schedule, such as a schoolteacher; (2) a high percentage of an employer's workforce asserting rights to the same Sabbath; and (3) fellow employees with greater seniority forced to work weekends. *Id.* at 2918, 2918 n.9.

Under the religious accommodation provision of Title VII, however, the religious views of an anti-union employee need not be accommodated if the union or employer can establish "undue hardship." *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 400 (9th Cir. 1978).⁴ In addition, allowing a religious objector to make substitute charitable payments gives religious employees no financial or lifestyle advantages over non-religious employees.

Because of these significant differences in the statutes involved, *Thornton* does not undermine *Tooley's* conclusion that granting an exemption to religious employees is a reasonable accommodation

⁴ For example, a union could establish undue hardship if a widespread refusal to pay union dues occurred. *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 407 (9th Cir. 1978).

which does not significantly advance or inhibit any religion.⁸

C. Excessive Government Entanglement

Tooley held that implementation of the substituted charity accommodation required only a minimal amount of supervision and administrative cost, and that it therefore did not impermissibly entangle the government in religion. 648 F.2d at 1246. "Once the sincerity of a religious objector's belief is established, the only administrative burden involves the employee and the union agreeing on a mutually acceptable charity." *Id.*

The union challenges Nichols' characterization of her views as "religious," and argues that they are actually secular in nature. The union argues that an investigation into the *nature*, as opposed to the *sincerity*, of Nichols' beliefs would impermissibly entangle the government in religion.

The union has presented no evidence to support its argument that an inquiry into whether Nichols' beliefs are truly religious in nature would cause more entanglement than an inquiry into the sincerity of those beliefs. In both cases it would be entirely appropriate, indeed

⁸ This court takes note of the fact that the Third Circuit recently upheld the constitutionality of the religious accommodation provision against a similar argument based upon *Thornton. Protos v. Volkswagen of America, Inc.*, Not. 85-3591 (July 19, 1986) (August 5, 1986, BNA Daily Labor Report). The court stated:

Unlike the Connecticut statute, Title VII does not require absolute deference to the religious practices of the employee, allows for consideration of the hardship to other employees and to the company, and permits an evaluation of whether the employer has attempted to accommodate the employee.... Any effect the statute has of advancing religion, therefore, would appear to be incidental to its primary effect of promoting freedom of conscience and prohibiting discrimination in the workplace.

Page D-4.

The court also notes Justice O'Connor's concurrence in *Thornton*, joined in by Justice Marshall. Justice O'Connor stated that, since Title VII calls for reasonable, not absolute, accommodations, and protects all religious beliefs, not only the Sabbath observance, the constitutionality of the religious accommodation provision of Title VII is not called into doubt by the majority opinion in *Thornton*. 105 S.Ct. at 2919.

necessary, for a court to look behind the veil of asserted religious doctrine to see if the claimant acts in a manner inconsistent with the claimed belief or is fraudulently concealing secular motivations. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2d Cir. 1985). This court is therefore bound to follow *Tooley's* determination that the need to verify the basis of a request for exemption does not create excessive government entanglement in religion.

IV. CONCLUSION

Defendant Nichols had the right, under the religious accommodation provision of Title VII, to make a substituted charitable payment in lieu of joining or financially supporting the union. Plaintiff's motion for summary judgment is therefore DENIED.

Because there are no material facts in dispute, defendants' motions for summary judgment are GRANTED.*

The court does not find that plaintiff's pleadings were frivolous or legally unreasonable. Defendant Nichol's motion for sanctions under Fed. R. Civ. P. 11 is therefore DENIED.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 3rd day of November, 1986:

/s/ Barbara J. Rothstein

BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT JUDGE

* The Union did not raise its claim that Nichols' objections are not "religious" in its response to defendants' motions for summary judgment. The religious nature of Nichols' objections is therefore not a material fact in dispute, and does not prevent summary judgment from being granted to defendants.

Furthermore, the record clearly shows that Nichols' objections were based upon her own personal understanding of the bible. (See, e.g., deposition of Nichols, at 13, 18, 26-27). This is clearly a "religious" basis for her beliefs. To defeat a motion for summary judgment, the evidence offered in opposition to the motion must be sufficient to require a finder of fact to resolve the parties' differing versions at trial. *British Airways Board v. Boeing Company*, 585 F.2d 946, 952 (9th Cir. 1978). The union has not presented any evidence which could lead a finder of fact to reject this conclusion.

APPENDIX B

Relevant Constitutional Provisions and Statutes

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CIVIL RIGHTS ACT OF 1964

42 U.S.C. §2000e-2. Discrimination because of race, color, religion, sex, or national origin.

(a) Employers. It shall be unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(c) **Labor Organization.** It shall be unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e. Definitions

For the purpose of this title [42 USCS §§ 2000 et seq.] —

- ... (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

- ... (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage

or discourage membership in any labor organization: Provided, That nothing in this Act [29 USCS §§151-158, 159-168], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 USCS § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) [29 USCS § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

- (b) It shall be an unfair labor practice for a labor organization or its agents —
- ... (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or

terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C. §169. Individuals with religious convictions.

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organizations as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code [26 USCS § 501(c)(3)], chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

APPENDIX C

C-1

National Right To Work Legal Defense Foundation, Inc.
(established in 1968)

8001 Braddock Road • Springfield, Virginia 22160 (703) 321-1810

May 30, 1985

Mrs. Keith R. Nichols
Post Office Box 16327
Seattle, Washington 98116

Dear Mrs. Nichols:

This will respond to your telephone call of May 24, 1985. I am enclosing the following items to assist you in preparing your request for accommodation of your religious beliefs:

1. Creed of the Christian Auto Workers;
2. Hearing Officers Recommended Determination
In the Matter of: John H. Miller;
3. EEOC: Religious Discrimination Guidelines;
4. Brief for employee Linda Leonard before the Washington PERC; and
5. Decision of the Washington PERC in *Edmonds Education Association v. Patrick.*

The principles indicated in these materials are equally applicable to your employment with Boeing.

To make sure that all necessary groundwork is properly laid, I suggest that you send a copy of the enclosed form letter to both the Union and Boeing requesting an accommodation of your religious beliefs. There is a six month statute of limitation so write *now*. If they either reject your request or do not respond, the next step is to file a complaint with the EEOC. The EEOC Complaint should be sent to:

Equal Employment Opportunity Commission
Dexter Horton Building — 710 Second Avenue
Seattle, Washington 98104 — Telephone: 206/399-0968

Defending America's working men and women against the injustices of compulsory unionism.

CHRISTIAN AUTO WORKERS

P.O. Box 66277
Roseville, MI 48066

"MANIFESTO"

I believe that all work is honorable and a gift from God. Therefore I consider my job a calling and that my employer or employee is worthy of all honor. To do anything less than my very best would be blasphemy to the Name of God and His Doctrine.

(1 Tim. 6:1-2, 1 Cor. 7:20-24, Ecc. 5:18-19)

I believe that my employer or employee and I are one and that we are both partakers of the same benefits of our labor. I believe in being content with my wages and I will not be moved in fear of want or covetousness knowing that God shall supply all my needs.

(1 Cor. 3:8, 1 Tim. 6:2, Col. 3:22-25, Phil. 4:11,

Heb. 13:5-6, John 6:35, 2 Cor. 8:12-15, Matt. 6:24-34)

I believe in more than the principle of a fair day's work for a fair day's pay. I believe in doing all that I can to contribute to the success of my employer or employee.

(Col. 4:1, Jam. 5:1-5, Titus 2:9-10, Eph. 6:5-9,

1 Cor. 3:13-15, 1 Tim. 6:17-19)

I believe that no one should have the right to intervene into the relationship between myself and my employer or employee. I also believe that it is a God given right for anyone to work where-ever or for whomever they choose without any intervention from a third party. Therefore, I will not join or financially support any labor union whose philosophy is in opposition to my religious tenets.

(Rom. 16:17-19, 1 Tim. 6:1-10, Matt. 20:1-16,

2 Tim. 3:1-5, Col. 2:8)

C-3

I believe that I am a Servant to my employer or employees as unto our Lord as He is unto us. Therefore, I will not be involved in any manner with strikes, nor will I lie, cheat, or betray my employer or employee in any way.

(Ecc. 10:4-7, 1 Cor. 7:20-24, Titus 2:9-10, Lu. 22:27, Ecc. 10:18)

I believe in the ministry of reconciliation by the word of reconciliation. I believe God can and will intervene in our labor problems by way of His people. I also believe that God is in control of our destiny and that He alone can heal our land if we trust in Him and not man.

(2 Cor. 5:17-19, Col. 1:20-22, Prov. 16:7, 1 Pet. 2:18-23,
Mal. 3, Joel 2:18-19, Isc. 66:5-6)

I believe that I should be held accountable to the CAW Manifesto and I promise to do my very best to uphold it. I also understand that as a requirement of membership in the CAW, I cannot be a member of any labor organization and that the CAW is not a labor union but rather a Christian Organization whose affiliation guarantees me the Right to be a Free Agent for my own labor in the United States Work Force.

Name _____

CAW President _____

C-4

(Date)

(Union) (Employer)

Dear _____:

I am employed by _____ (employer) . Pursuant to the collective bargaining agreement between the _____ (employer) and the _____ (union) , an agency fee is required to be paid to _____ (union) . I am not a member of the union.

The _____ (union) is affiliated with the _____ and the _____ . A portion of the fee that is being demanded is paid to those organizations. Those organizations take positions on certain religious matters such as _____ , contrary to my sincere and deeply held religious views. These views are violated by my currently forced financial support of the union and the consequent forced association with an organization (the union) which promotes ideas that are contrary to my religious beliefs. In order to avoid this violation of my religious conscience, it is requested that I be permitted to make a voluntary contribution to a non-labor, non-religious charitable organization equal to the amounts which are currently being demanded.

My request for accommodation of my religious views is based upon the following provisions of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2e and 2000e(j). That statute and current case law requires the School Board and the union to make reasonable accommodations to permit me to continue my employment without having my religious beliefs violated through the forced support and association with the union. I believe that a charitable contribution is a reasonable accommodation. *See, Tooley v. Martin-Marietta Co.,*

648 F.2d 1239 (9th Cir. 1981), *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 422 U.S. 921, 99 S.Ct. 2848, 61 L.Ed. 2d 290 (1979), *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed. 2d 38 (1979), *McDaniel v. Essex International, Inc.*, 571 F.2d 338 (6th Cir. 1978).

Please have the courtesy to promptly reply to this letter. If you do not reply, I will assume that you are refusing to make a reasonable accommodation of my religious views.

Very truly yours,

(Excerpt from the deposition of Thomasine Nichols)

Q. Did you seek out assistance of anyone when you were faced with this problem at the Boeing Company concerning either joining or paying dues to the machinists union?

A. Before or after I started working?

Q. Well, before you started working?

A. Not before, no.

Q. After you started working did you seek the assistance of anyone else?

A. The National Right To Work Defense Committee. I have been supporting them for some time.

Q. How long have you been supporting the National Right To Work Committee?

A. Oh, about — let's see, eight years.

Q. How did it come to pass that you personally decided to support this organization?

A. I like what they do.

Q. What is it that you understand that they do that you like?

A. They defend people who are being pressured by unions to join.

Q. You think then that that is a bad thing for our society?

A. Which?

Q. That unions pressure people to join the union?

A. Definitely.

Q. Do you think that it is a bad thing for all unions and all people?

A. There should not be any unions anytime anywhere.

Q. Then I take it it is your view that unions are a bad thing and should be abolished?

A. That's right.

Q. How and why do you believe that unions are a bad thing which should be abolished?

A. The scripture says so.

Q. Is it your view then that even for people who do not perhaps agree with your reading of the scriptures, that still even for those people that unions are a bad thing and should be abolished?

A. Right.

Q. Well, I take it then that your reading of the scriptures is such that you would, if it were within your ability, you would impose upon all people in our society a rule that there can be no unions; is that correct?

A. Right. Right.

Q. In what way have you supported the Right To Work Committee over the past eight years?

A. Sending them money.

Q. About how much money per year have you sent them?

A. I really don't know. It depends on how much I was making. Times when I wasn't working they didn't get much, but when I was —

Q. Give us a range low and high over the last eight years. I realize it would be an estimate.

A. At least 50 a year.

Q. What would be the highest that you have given them?

A. Oh, maybe 200.

